

In the Matter of)
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Open Internet Order Remand Proceeding) GN Dkt. No. 14-28
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CTIA – The Wireless Association® (“CTIA”) hereby responds to the Federal Communications Commission’s (“Commission’s”) Public Notice seeking comment on how it should proceed in the wake of the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *Verizon v. FCC*.¹ These comments make the following points:

- The market for mobile broadband services is vigorously competitive and embraces Internet openness, as evidenced by a marketplace teeming with successful third-party applications and devices and the absence of any demonstrated harm relating to mobile broadband practices.
- The wireless industry has made clear that the D.C. Circuit’s decision does nothing to undercut its commitment to Internet openness.
- As the Commission recognized in the 2010 *Open Internet Order*, the unique characteristics of mobile broadband networks render them especially unsuited to prescriptive open Internet mandates. The same holds true today.

This competitive marketplace, coupled with the still-in-effect transparency rules, serves to promote openness and deter any harmful practices, as no provider wants to adopt practices that could be deemed objectionable in the court of public opinion and drive customers to their

¹ 740 F.3d 623 (D.C. Cir. 2014). *See New Docket Established to Address Open Internet Remand*, Public Notice, DA 14-211 (rel. Feb. 19, 2014).

competitors. In light of the myriad consumer benefits being delivered by the competitive and innovative mobile wireless ecosystem, the Commission should monitor the market but refrain from pursuing prescriptive regulation.

I. THE MOBILE BROADBAND MARKETPLACE IS VIGOROUSLY COMPETITIVE, WITH ROBUST INVESTMENT, INNOVATION, AND OPENNESS.

As Chairman Wheeler has emphasized, “[c]ompetitive markets produce better outcomes than regulated or uncompetitive markets.”² Thus, “[i]f the facts and data determine that a market is competitive, the need for FCC intervention decreases.”³ Such intervention is required only “where private markets cannot be expected to deliver what the public needs.”⁴ The mobile broadband marketplace is intensely competitive, characterized by strong investment, rampant innovation, and pervasive openness. Under these conditions, the principles set forth by Chairman Wheeler weigh strongly against the adoption of prescriptive open Internet mandates.

A. Competition Throughout the Mobile Broadband Ecosystem Is Extremely Intense.

A brief review of the U.S. mobile broadband service market reveals extraordinary competition as providers vie to acquire and serve end users, maintaining a strong commitment to Internet openness that enables third-party applications and devices to thrive.

² Tom Wheeler, Chairman, FCC, Remarks at The Ohio State University (Dec. 2, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324476A1.pdf.

³ *Id.*

⁴ Tom Wheeler, Chairman, FCC, Remarks at the Computer History Museum (Jan. 9, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0117/DOC-325054A1.pdf.

According to the Commission’s most recent *Mobile Competition Report*, 82 percent of U.S. consumers have access to service from four or more mobile broadband providers, nearly 92 percent of U.S. consumers have access to three or more mobile broadband providers, and nearly 98 percent of consumers have access to two or more.⁵ The United States has the most facilities-based mobile providers of any nation – 180 according to the FCC’s most recent data⁶ – and has the least concentrated mobile wireless market out of 28 OECD countries, according to a comparison using third-quarter 2013 data.⁷

The mobile broadband provider market is characterized by investment, innovation, and price competition. Mobile providers invested more than \$33 billion in their networks in 2013 – four times more per subscriber than the rest of the world.⁸ The U.S. is the runaway global leader in 4G deployment: with just 5 percent of the world’s wireless connections, we have almost *half* of all LTE connections worldwide.⁹ Americans consume twice as much mobile data as their

⁵ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Sixteenth Report*, 28 FCC Rcd 3700, 3750 (2013) (Table 9: Estimated Mobile Wireless Broadband Coverage by Census Block, Oct. 2012).

⁶ See Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition: as of December 31, 2012*, at 29 Table 18 (Nov. 2013), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324413A1.pdf.

⁷ Based on Glen Campbell, 2014: *The year ahead*, Bank of America Merrill Lynch, Global Wireless Matrix 4Q13 (Jan. 8, 2014) (as expanded to include the Czech Republic, Hungary, and Poland, by CTIA Research).

⁸ See Didier Scemama, *et al.*, 2014 wireless capex: *BRICs & Europe to pick up the slack*, Bank of America Merrill Lynch, Global Telecom Equipment, at Table 2 (Jan. 13, 2014).

⁹ See CTIA, *The U.S. Wireless Industry: Leading the World in Investment, Value, Innovation, and Competition* at 5 (Nov. 2013), attached to Letter from Scott K. Bergmann, Vice President, Regulatory Affairs, CTIA, to Hon. Thomas E. Wheeler et al., FCC, GN Dkt. No. 09-51, WT Dkt. No. 13-135 (filed Nov. 13, 2013) (“*Leading the World*”).

counterparts in the European Union.¹⁰ Moreover, as usage grows, wireless data prices continue to fall, dropping 93 percent from 2008 to 2012.¹¹ Indeed, this year has brought continued innovation in service and pricing plans: AT&T announced a pricing plan offering families 10 GB of data plus unlimited talk and text on four lines for \$160 a month.¹² Sprint introduced its “Framily” plan, allowing friends and family to obtain 1 GB of data plus unlimited talk and text for as little as \$25 per month.¹³ T-Mobile announced that it would pay the early termination fees incurred by customers switching to its offerings, as well as pay for the devices these customers had used to access rivals’ networks.¹⁴ And Verizon Wireless introduced its “MORE Everything” plan, which increases data allowances, adds unlimited international messaging, and provides cloud storage for every account-holder.¹⁵ In light of this investment, innovation, and competition, it is unsurprising that 91% percent of U.S. consumers are “highly satisfied” with their wireless service.¹⁶

¹⁰ See *id.* at 11.

¹¹ See *id.* at 10.

¹² See Press Release, AT&T, *AT&T’s Best-Ever Pricing for Families* (Feb. 11, 2014), available at http://about.att.com/newsroom/espionage_for_best_ever_pricing_for_families_feb.html#sthash.uQ5n1wC.dpuf.

¹³ See Press Release, Sprint, *Sprint Introduces One Big Happy Framily in New Advertising Campaign* (Jan. 17, 2014), available at <http://newsroom.sprint.com/news-releases/sprint-introduces-one-big-happy-framily-in-new-advertising-campaign.htm>.

¹⁴ See, e.g., Nick Wood, *T-Mobile CEO turns air blue as he shares plan to paint US mobile market pink*, Total Telecom (Jan. 9, 2014).

¹⁵ See Press Release, Verizon, *MORE Everything Gives Customers More From Their Wireless Plans* (Feb. 13, 2014), available at <http://www.verizonwireless.com/news/article/2014/02/more-everything-plans.html>.

¹⁶ See *Leading the World* at 13.

This highly competitive mobile broadband market has led to an open environment in which third-party applications and devices thrive completely independent of regulatory requirements. There are over 790 different handsets and devices on sale in the U.S., built by more than 50 different manufacturers.¹⁷ These handsets are available from carriers, from the manufacturers directly, and from third-party retail outlets such as Best Buy, RadioShack, Wal-Mart, Target, and others.¹⁸ The number of 4G-connected devices in use increased 273 percent in 2012 alone. While smartphone penetration continues to grow, Americans also access mobile broadband services through more than 100 different types of tablets.¹⁹

The market for third-party mobile applications is even more diverse, catering to 14 different mobile operating systems. In July 2013, Android's Google Play app store officially offered more than one million apps, surpassing Apple's app store and its 900,000 applications.²⁰ As of the end of the first quarter of 2013, users were spending 87 percent of their mobile time online using apps.²¹ As of December 2012, there were more than 3.57 million apps available from 24 non-carrier applications stores, and there are dozens more independent, third-party stores offering such applications.²²

¹⁷ *See id.* at 15.

¹⁸ *See id.*

¹⁹ *See id.* at 15-16.

²⁰ *See id.* at 17. *See also* Conner Flynn, *Google Play Beats App Store with Over 1 Million Apps*, Geeky Gadgets (July 25, 2013), available at <http://www.geeky-gadgets.com/google-play-beats-app-store-with-over-1-million-apps-25-07-2013/>.

²¹ *Leading the World* at 17.

²² *See, e.g.*, Distimo at <http://www.distimo.com/> (last visited Mar. 21, 2014); 148apps.biz, available at <http://148apps.biz/app-store-metrics/?mpage=appcount> (last visited Mar. 21, 2014); AppBrain, <http://www.appbrain.com/stats/number-of-android-apps> (last visited Mar. 21, 2014);

B. The Wireless Industry Remains Committed to an Open Internet in the Wake of the D.C. Circuit’s Decision.

Mobile broadband providers’ commitment to Internet openness remains resolute. Indeed, statements by mobile providers following the *Verizon* decision confirm that mobile broadband providers will maintain their commitment to open networks. The day the opinion was published, CTIA President & CEO Steve Largent emphasized that the decision “does nothing to temper CTIA members’ long-standing commitment to an open Internet and a vibrant wireless ecosystem because that’s what wireless customers demand.”²³

Individual mobile carriers also reaffirmed their commitment to Internet openness following the court’s decision. For example:

- AT&T stated that it “has been committed to the open Internet since [its] endorsement of the FCC’s statement of Internet freedoms in 2004,” and confirmed that its “commitment to protect and maintain an open Internet will not change.”²⁴
- Sprint said that it “has always supported an open Internet for its customers, and the developers and device manufacturers with which it partners, and we do not anticipate changing that support because of the court’s ruling.”²⁵
- Verizon stated that “One thing is for sure: [the court’s] decision will not change consumers’ ability to access and use the Internet as they do now.” It made clear

Global mobile statistics 2013 Section E: Mobile apps, app stores, pricing and failure rates, mobiThinking (May 2013) (Section 7(a)), available at <http://mobithinking.com/mobile-marketing-tools/latest-mobile-stats/e#toomanyappstores>.

²³ See Steve Largent, CTIA Statement on the D.C. Circuit Court’s Decision on Net Neutrality, CTIA Blog (Jan. 14, 2014), available at <http://blog.ctia.org/2014/01/14/ctia-net-neutrality/>.

²⁴ See AT&T Statement on the U.S. Court of Appeals D.C. Circuit Open Internet Decision, AT&T Public Policy Blog (Jan. 14, 2014, 3:55pm), available at <http://www.attpublicpolicy.com/fcc/att-statement-on-the-u-s-court-of-appeals-d-c-circuit-open-internet-decision/>.

²⁵ See Jonathan Make, Jimm Phillips, *Immediate Change to ISPs’ Data Policies Seen Unlikely Post-Net Neutrality Ruling*, Comm. Daily (Jan. 23, 2014).

that the company “remains committed to the open Internet,” and that “[t]his will not change in light of the court’s decision.”²⁶

Moreover, commitments such as these will be easy for consumers and regulators to monitor. The D.C. Circuit left standing the Commission’s transparency rule, which requires mobile and fixed broadband providers to “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.”²⁷ Thus, providers will continue to be required to disclose any change in their network practices to consumers, app developers, and manufacturers. Under these circumstances, providers will be loath to adopt practices that could drive customers to their competitors. In the robustly competitive marketplace just described, the disclosure obligation will ensure that the mobile Internet remains open, as it is today.

II. THE COMMISSION CONCLUDED PROPERLY IN 2010 THAT MOBILE BROADBAND PROVIDERS SHOULD NOT BE SUBJECT TO PRESCRIPTIVE NON-DISCRIMINATION AND BROAD NO-BLOCKING REQUIREMENTS.

In the *Open Internet Order*, the Commission recognized that non-discrimination requirements and far-reaching no-blocking mandates were not appropriate for the mobile broadband segment.²⁸ It based this conclusion on several factors, including not only the

²⁶ See Press Release, Verizon, *Open Internet Ruling: No Change for Consumers’ Ability to Access and Use the Internet* (Jan. 14, 2014), available at <http://newscenter.verizon.com/corporate/news-articles/2014/01-14-verizon-reiterates-commitment-to-open-internet/>.

²⁷ 47 C.F.R. § 8.3.

²⁸ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17956-62 ¶¶ 93-106 (2010) (“*Open Internet Order*”), *rev’d in part Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

competitiveness of the mobile broadband market,²⁹ but also mobile-specific operational constraints³⁰ and the “very rapid innovation and change” within the mobile broadband segment.³¹ These realities apply equally to today.

Operational Constraints. As the Commission recognized in the *Open Internet Order*, “existing mobile networks present operational constraints that fixed broadband networks do not typically encounter.”³² For example, mobility itself complicates the provision of service. Mobile broadband communications involve complex hand-offs (between different cell sites), network resource management, and other engineering challenges not applicable to fixed networks. Further, reliance on limited spectrum resources that must be shared among users necessitates more aggressive and dynamic network management than might be needed on other platforms. These constraints put a premium on maintaining providers’ flexibility to meet consumers’ needs in evolving ways as new challenges arise.

The Still-Developing Mobile Broadband Marketplace. The *Open Internet Order* also recognized that mobile broadband is still an emerging service:

The mobile ecosystem is experiencing very rapid innovation and change, including an expanding array of smartphones, aircard modems, and other devices that enable Internet access; the emergence and rapid growth of dedicated-purpose mobile devices like e-readers; the development of mobile application (“app”) stores and hundreds of thousands of mobile apps; and the evolution of new business models for mobile broadband providers, including usage-based pricing.³³

²⁹ *See id.*

³⁰ *See id.* at 17957 ¶ 95.

³¹ *Id.* at 17956-57 ¶ 94.

³² *See id.* at 17957 ¶ 95.

³³ *Id.* at 17956-57 ¶ 94.

These facts remain as true today – if not more so. All of the major carriers are now making multi-billion dollar investments to deploy and augment LTE, and consumers are benefiting enormously, as app and device makers respond with their own innovative offerings to take advantage of LTE’s capabilities. But carriers already are also looking at the next generation of capabilities, such as LTE Advanced, which will generate even further investments and further innovations in devices and apps. Thus, the logic that stayed the Commission’s hand in 2010 should prompt similar caution today. The Commission must be sure to avoid requirements that would interfere with the mobile broadband market’s dynamic and ongoing cycle of investment and innovation.

III. THE COMMISSION SHOULD AVOID PRESCRIPTIVE REGULATION THAT WON’T KEEP PACE INNOVATION IN THIS COMPETITIVE MARKETPLACE.

Given the exceedingly competitive and dynamic nature of the mobile wireless marketplace, the absence of any demonstrated harm relating to mobile broadband practices, and the enormous welfare gains that the marketplace is conferring upon consumers, the Commission should avoid prescriptive regulation that will be outdated as soon as the ink is dry.

The mobile broadband space is evolving more rapidly and in more unexpected ways than perhaps any other segment overseen by the Commission. And the pace of change is, if anything, accelerating. Recognizing that the marketplace will deter any harmful practices, the Commission should monitor developments regarding mobile Internet openness and focus on notice and customer choice. If it identifies issues for further exploration, the Commission should consider referring issues to multi-stakeholder processes or stakeholder organizations to address. These bodies are well equipped to keep pace with change in the dynamic and evolving mobile space in a way that prescriptive regulation cannot.

IV. CONCLUSION

CTIA commends the Commission for beginning this conversation regarding the appropriate means of protecting consumer interests with respect to broadband Internet services, and – for the reasons discussed above – urges the Commission to refrain from applying prescriptive open Internet regulations to mobile broadband offerings.

Respectfully submitted,

CTIA–THE WIRELESS ASSOCIATION®

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